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December 3, 1996

Mr. Robert Gnidziejko  
District Director for OFCCP  
Albuquerque District Office  
505 Marquette, N.W. Suite 810  
Albuquerque, NM 97102

Re: Los Alamos National Laboratory

Dear Bob:

This letter requests a status update of all outstanding OFCCP matters pertaining to the Los Alamos National Laboratory (the "Laboratory") and responds to your October 11, 1996, letter entitled "Notification of Results of Investigation" ("NORI"). The NORI states your office's preliminary findings with respect to its investigation of the complaints filed by fourteen former employees the Laboratory terminated pursuant to its November 1995 Reduction in Force ("RIF"). Your office believes you have jurisdiction over their so-called "class complaints" by virtue of the complaint of Evelyn Jacquez.

Your office's investigation of the employment practices at the Laboratory has not been limited, however, to the investigation of the fourteen former employees' complaints concerning the RIF. Rather, there are several outstanding matters not addressed by the NORI as to which your office has not yet informed the Laboratory of its findings.

On December 13, 1995, your office commenced the Desk Audit phase of a Compliance Review of the Laboratory's equal employment opportunity and affirmative action policies. Further, in the course of investigating the fourteen former employees' Executive Order 11246 complaints, your office concurrently investigated three complaints filed pursuant to Section 503 of the Rehabilitation Act. During the complaint investigation, your office also conducted the On-Site phase of the Compliance Review. The Laboratory fully cooperated with your office as it conducted its Compliance Review and investigation of the Section 503 complaints.

Your office has issued no findings to date with regard to its Compliance Review. At the Exit Conference, you informed the Laboratory that the Compliance Review was completed, but you have not issued any findings or finding of compliance. With regard to its investigation of two of the three Section 503 complaints, your office has issued separate NORIs stating its findings that the Laboratory did not violate the complainants' rights under Section 503.

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The Laboratory has not received your office's findings with regard to the third Section 503 complainant (Harold Frost). Please consider this a request for a status update on all outstanding matters, including specifically the Compliance Review and the outstanding Section 503 complaint.

## **I. SUMMARY OF NORI**

Significantly, the NORI concludes the fourteen complainants' allegations of discrimination on the basis of national origin in various employment activities including, but not limited to, wages, promotions, harassment, retaliation, and training are untimely and/or without merit. Accordingly, this response does not address those individual complaints.

However, the NORI states your office's preliminary findings in response to the October 26, 1995 Complaint of Evelyn Jacquez that the November 1995 RIF resulted in the disparate treatment of Hispanic employees of the Laboratory.<sup>1</sup> To support this finding, the NORI alleges a disproportionate pattern of selection of Hispanic employees versus White employees in the RIF. As explained below, the Laboratory disagrees with your office's findings and underlying allegations with respect to the November 1995 RIF because there is no compelling evidence the Laboratory engaged in unlawful discrimination, and a statistical analysis of the November 1995 RIF reveals the RIF did not result in a legally statistically significant adverse impact on Hispanic employees in any division the RIF affected.

## **II. LIMITED SCOPE OF NORI**

In addition to the findings concerning alleged discrimination in the November 1995 RIF, the NORI discusses numerous alleged "inconsistencies" in the RIF process. While the Laboratory does not agree with the Department's suggestion that there were inconsistencies in the application of the Laboratory's RIF procedures, your office offers no explanation in the NORI as to how any of these "inconsistencies" (even if they were true -- which they are not) constitute discrimination based on national origin or any other impermissible characteristic. As you are aware, OFCCP's authority does *not* extend to enforcement of the Laboratory's internal policies and procedures. Rather, OFCCP's authority to investigate complaints concerning the November 1995 RIF is limited to whether any practices of Laboratory management were *unlawfully discriminatory*.<sup>2</sup>

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1 The NORI's allegation of disparate treatment of Hispanic employees is surprising given your previous statement at the Exit Conference that there would be no suggestion the Laboratory engaged in intentional discrimination.

2 The OFCCP, by delegation of the Secretary of Labor, drafted specific regulations to that effect at 41 CFR 60-1, *et seq.* implementing the directives set forth in Executive Order 11246. Those regulations have as their stated purpose "the promotion and insuring of *equal opportunity* for all persons, without regard to race, color, religion, sex, or national origin, employed or seeking employment with Government contractors..." 41 CFR 60-1.1 (emphasis added). This is in keeping with the authority the Executive Order bestows on the Secretary of Labor to enforce the United States government's stated policy to "*provide equal opportunity*" and to "*prohibit discrimination* in employment because of race, creed, color, or national origin."

Because the OFCCP's investigation and enforcement authority is limited by law to the determination whether the employment practices of a federal contractor, like the Laboratory, are unlawfully discriminatory, OFCCP's allegations that the Laboratory's internal policies and procedures were inconsistently applied, absent evidence of actual unlawfully discriminatory conduct, are irrelevant to the issues in this case. Accordingly, this response does not attempt to address or dispute these alleged "inconsistencies." Moreover, any "inconsistencies" between divisions, to the extent they exist, would provide further factual support for the Laboratory's position that the November 1995 RIF was a "division-by-division," rather than a Laboratory-wide RIF.<sup>3</sup>

### **III. SUMMARY OF THE LABORATORY'S POSITION**

The Laboratory did not unlawfully discriminate on the basis of national origin or any other impermissible consideration in the design or implementation of its November 1995 RIF. Rather, each Laboratory division participating in the RIF made termination decisions based on the four objective factors the Laboratory developed and communicated to its division managers, as noted more fully below. Although the NORI alleges the disparate treatment of Hispanic employees in the 1995 RIF, the NORI presents no direct or even anecdotal evidence of unlawful intentional discrimination. Indeed, far from condoning discrimination on the basis of national origin, the Laboratory provided its managers RIF guidelines instructing them to refrain from considering an employee's national origin (and other impermissible characteristics) in selecting employees for the RIF. Further, the Laboratory provided its managers training regarding the RIF process during which managers were again specifically instructed to not consider such impermissible characteristics as national origin in selecting employees for the RIF. OFCCP has adduced no evidence any Laboratory manager deviated from these express policies.

Rather than present direct evidence of intentional discrimination against Hispanic employees, the NORI asserts the November 1995 RIF resulted in statistical disparities between Hispanic employees and White employees. However, the statistical evidence the NORI cites is thrice flawed.

First, it appears your office relied wholesale on data supplied by the Laboratory in response to your office's specific requests and did not "purify" the data to ensure its accuracy. For example, employees who elected to participate in the Laboratory's Voluntary Separation Program and employees who were on medical leaves of absence at the time of the RIF should have been excluded from the data. Properly categorized data are noted below.<sup>4</sup>

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3 Moreover, some of the "inconsistencies" mentioned in the NORI actually operated to the benefit of Hispanic employees. For example, while it is true that some employees were placed in more than one skills set, this phenomenon worked to the advantage of Hispanics. Being placed in more than one skills set reduced an employee's chances of layoff, and Hispanics were over-represented in the group of employees receiving this advantage.

4 The data your office used for analysis were flawed as to both the employee population at risk for the RIF and the population terminated pursuant to the RIF. The correct data set is as follows: 3022 employees were at risk of being laid off, 1882 of whom were White and 990 of whom were Hispanic. 197 employees were separated pursuant to the November 1995 RIF, 90 of whom were White and 97 of whom were Hispanic.

Second, the "Laboratory-wide" statistical base your office used is architecturally flawed since local managers within each division made the at-issue RIF decisions. Hence, a division-by-division analysis as displayed below is required as a matter of law.

Third, even accepting the validity of your office's aggregation across decision makers, which is inappropriate as a matter of law, the formula your office used to analyze the impact of the November 1995 RIF contained a significant error.

A corrected analysis of the November 1995 RIF demonstrates there was no legally significant statistical adverse impact in any of the twenty divisions in which Hispanics were at risk of termination pursuant to the RIF. Moreover, even accepting the flawed architecture and impure data used in your office's analysis, but correcting for the error in your formula, the RIF did not result in a legally significant statistical adverse impact against Hispanics.

#### **IV. OVERVIEW OF RELEVANT LEGAL PRINCIPLES**

Disparate treatment cases arising under Executive Order 11246 are analyzed under the tripartite burden shifting scheme used to analyze Title VII claims as set forth in *McDonnell Douglas v. Green* (See Tab 1), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). See, also, *EEOC v. Flasher Co., Inc.* (See Tab 2), 986 F.2d 1312, 1316 (10th Cir. 1992). Initially, OFCCP must present a *prima facie* case of unlawful discrimination against the Hispanic complainants. *Id.* Once OFCCP has established a *prima facie* case, the burden to go forward with evidence shifts to the Laboratory to merely articulate (not prove) a facially nondiscriminatory reason for the at-issue adverse employment action. *Id.* Once the Laboratory has "articulated" a facially nondiscriminatory reason for the adverse employment action taken, the burden to go forward with evidence then shifts back to OFCCP to prove the proffered reason was a "pretext" for the Laboratory's intentionally discriminatory acts. *Id.* In other words, OFCCP must then prove the Laboratory's articulated nondiscriminatory reason was false and that an unlawfully discriminatory reason more likely than not motivated the Laboratory in taking the adverse employment action. *Pitre v. Western Elec. Co., Inc.* (See Tab 3), 843 F.2d 1262, 1266 (10th Cir. 1988).

The NORI alleges the Laboratory engaged in a pattern or practice of unlawful discrimination against certain of its Hispanic employees. OFCCP attempts to present a *prima facie* case of discrimination by presenting only statistical evidence that the RIF disproportionately impacted Hispanics. OFCCP does not, however, accompany its statistical evidence with any anecdotal evidence detailing specific instances of alleged discrimination, let alone evidence sufficient to prove a pattern of intentional and unlawful discrimination. *Pitre*, 843 F.2d at 1267 (emphasis added) (Plaintiff must "show more than accidental or sporadic incidents of discrimination; [he or she] must show that 'discrimination was the company's standard operating procedure -- the regular rather than the unusual practice'").<sup>5</sup>

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<sup>5</sup> It is highly unlikely, as a matter of law, OFCCP could make the *Pitre* showing (that unlawful discrimination was the usual operating practice) since the record evidence OFCCP has developed in its investigation was that no Laboratory division's operating practice unlawfully discriminated against Hispanic employees.

Generally, except in cases of "gross" statistical disparity, statistics alone are insufficient to make a *prima facie* showing of intentional discrimination. *Hazelwood School District v. United States* (See Tab 4), 433 U.S. 299, 307-308, 97 S.Ct. 2736, 53 L.Ed. 2d 768, 777 (1977). In *Hazelwood*, the Court found that discrimination may be inferred when "the difference between the expected value and the observed number is greater than two or three standard deviations." *Id.*, 433 U.S. at 309 n. 14. The Tenth Circuit, following *Hazelwood's* threshold of two to three standard deviations, has held that in cases, as here, where "the statistical disparity is insufficient alone to establish a *prima facie* case, the plaintiff may get over his or her initial hurdle by combining statistics with historical, individual, or circumstantial evidence." *Pitre*, 843 F.2d at 1267. Given that the NORI concludes the individual claims of discrimination are untimely and/or without merit, it is questionable whether OFCCP can present even a *prima facie* case of discrimination.

Assuming, however, OFCCP is able to present a *prima facie* case of discrimination, the burden of production then shifts to the Laboratory to come forward with evidence sufficient to rebut the *prima facie* case. *See, e.g., International Brotherhood of Teamsters v. United States* (See Tab 5), 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396, 430 (1977) (characterizing the burden as that of demonstrating that plaintiffs proof is either inaccurate or insignificant). The Laboratory may rebut a statistics-based *prima facie* case by discrediting the statistics, by presenting its own statistical evidence, and/or by presenting anecdotal and other nonstatistical evidence, such as favorable treatment of other members of the protected group. *See, e.g., EEOC v. Sears, Roebuck & Co.* (See Tab 6), 628 F. Supp. 1264 (N.D. Ill. 1986), *affd*, 839 F.2d 302 (7th Cir. 1988) (defendant successfully defended Title VII gender discrimination class action suit by discrediting EEOC's statistical evidence, producing statistical evidence of its own, and presenting anecdotal evidence to show a legitimate nondiscriminatory reason for the disparate results).

Once the Laboratory has satisfied its burden of production, the question whether OFCCP has made out a *prima facie* case is moot, and the burden shifts back to OFCCP to meet its ultimate burden of persuasion, which is to prove the Laboratory engaged in a pattern or practice of unlawful discrimination. To meet this burden, OFCCP must prove the Laboratory's articulated business justifications are *false* and that the Laboratory's detailed and deliberate RIF process, designed to select for the RIF the least qualified employees from each skills set in each division, was a pretext for unlawful discrimination against Hispanics.<sup>6</sup>

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<sup>6</sup> By comparison, a disparate impact claim requires no finding of intentional discrimination to prove a *prima facie* case. *Murphy v. Derwinski* (See Tab 7), 990 F.2d 540, 544 (10th Cir. 1993). To make out a *prima facie* case of discrimination under the disparate impact theory, plaintiff must show that a neutral employment practice or policy caused a significant disparate impact on a protected group. *Id.* As in pattern or practice discrimination cases, statistics may be used to show the disparate impact resulting from the complained of practice or policy. *Drake v. Ft. Collins* (See Tab 9), 927 F.2d 1156, 1161 (10th Cir. 1991). Once plaintiff has made out a *prima facie* case (under Title VII), the burden then shifts to defendant to rebut with evidence that the challenged practice or policy was job related for the position in question and justified by business necessity. 42 U.S.C. SS 2000e-2(k)(1)(B)(ii) (as added by the Civil Rights Act of 1991, SS 105(a)). If defendant meets its burden of proof, then to prevail, plaintiff must show the asserted justification is actually a "pretext" "covering up" unlawful discrimination. *Murphy*, 990 F.2d at 544. If plaintiff fails to show the asserted justification is pretextual,

(Footnote continued on next page)

Applying these legal principles to the October 11, 1996 NORI reveals the NORI fails in three separate ways, each of which is dispositive against OFCCP. First, the NORI fails to present even a *prima facie* case against the Laboratory, as the NORI relies entirely on statistics which suffer from both an inappropriate architecture and a flawed statistical formula. Second, the NORI fails to present "pattern or practice" proof, as it fails to present evidence of discrimination against Hispanics in any division of the Laboratory, let alone evidence that discrimination was the "usual" practice at the Laboratory. Finally, the NORI fails to present any evidence of pretext, *i.e.*, evidence that the Laboratory's articulated business justifications for the RIF are false and that the true motivation for the November 1995 RIF was unlawful discrimination against Hispanics.

## **V. OVERVIEW OF NOVEMBER 1995 RIF**

To properly analyze the impact of the November 1995 RIF, it is important to understand the design and implementation of the RIF. Most importantly, the decision-making unit for the RIF was the division since each Laboratory division has its own business plan, its own function within the Laboratory and its own funding sources. Accordingly, division directors managed the RIF within their divisions in the manner best suited to the particular division. Laboratory staff provided each division director with guidelines outlining the basic implementation procedures, which included assignment of employees into "skills sets" based on the employee's job function and the ranking or ordering of employees within skills sets based on a total score calculated by adding four separate scores on each of four objective factors:

- (1) demonstrated job performance;
- (2) experience and achievement;
- (3) skills, knowledge and abilities; and
- (4) transferability/versatility.

Further, division directors developed "RIF Justification Memoranda" describing the implementation of the RIF within their division and attaching the final RIF "matrices" reflecting employee rankings within each affected skills set.

Given these basic guidelines, each division implemented the RIF in a manner consistent with that division's focus and business needs. Division managers determined the number of employees to be laid off from each skills set based on one or both of the two primary "drivers" for the RIF: (1) budgetary (or "programmatic") shortfalls and (2) the need to reduce the ratio of support personnel to technical personnel, thereby increasing the percentage of the Laboratory's budget directly devoted to science. (Thus, it was possible that even if reduced support to technical ratios were achieved, budget pressures could force additional RIFs within a division.) Many divisions customized and made more specific the four factors given the

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defendant must then prevail on the disparate impact theory of discrimination. The NORI suggests OFCCP does not plan to pursue a discrimination claim against the Laboratory based on a disparate impact theory.

particular needs of the division. All divisions determined the weighting of the four factors, with many divisions opting to weight the four factors equally, while others weighted a particular factor more heavily based on the needs of the division.

In all divisions, division managers reviewed employee rankings numerous times at numerous levels. First, supervisors, team leaders and/or group leaders sought input from other supervisors, team leaders and/or group leaders within the group to ensure rankings were consistent among all supervisors who had reviewed the employee. Second, particularly in larger divisions, group leaders met with one another to discuss the validity of the rankings. Next, many of the larger divisions had committees made up of a subset of group leaders to finalize the division rankings. Finally, an Oversight Committee comprised of Human Resources and legal personnel for the Laboratory reviewed each division's RIF Justification Memorandum and individual RIF selection matrices to ensure nondiscrimination in RIF selections in each division. This lengthy and deliberate system provided numerous "checks" on the procedure for consistency and compliance with all anti-discrimination laws.

Although the NORI describes certain "inconsistencies" in the RIF process, these "inconsistencies," to the extent they exist, are simply differences between divisions which necessarily reflect the "division-by-division" structure of the November 1995 RIF. The different procedures by which various divisions implemented the RIF, based on the division's particular business considerations, is best illustrated by looking at the procedures employed in a few sample divisions.

#### I. Business Operations Division

The Business Operations (BUS) Division was forced to participate in the 1995 RIF based primarily on the Laboratory's need to reduce the support to technical ratio. Given this directive and the Laboratory's RIF guidelines, BUS division managers determined which functional areas within the division would need to be reduced. Next, the division established skills sets by first dividing employees into the four job families that comprised the BUS Division -- Technician; Organization and General Support; Specialist Staff Member; and Technical Staff Member. Next, the division defined skills sets using the Laboratory's job classifications/titles, with some modifications.<sup>7</sup> Examples of BUS skills sets included Technician/Computer, Organization and General Support/Financial and Technical Staff Member/Packaging Engineer. Next, the division assigned all employees (including managers) to the appropriate skills set based on their job functions. Division supervisors and managers then rated employees in each skills set based on the four established factors.

BUS employees received a score from "1" to "3" on each of the four factors. In rating employees, the BUS Division weighted the four factors equally with the exception of demonstrated job performance, which they rated twice as heavily as the other three factors. Discussion of ratings occurred at several levels. First, the division determined initial scores

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<sup>7</sup> For example, employees with different job titles who performed similar functions were combined into the same skills set (much like "Job Grouping").

during discussions between the team leader or supervisor for each employee and the group office. Next, managers and supervisors having employees in skills sets which crossed team or group lines met to ensure the accuracy and consistency of the ratings in each skills set. All BUS managers then met to again discuss the ratings and to consider any additional input into the ratings within each skills set. Following these meetings, BUS provided its final matrices and RIF Justification Memorandum to the Laboratory's Human Resources Department, at which time an Oversight Committee reviewed them to ensure consistency within the division and compliance with all antidiscrimination laws.

All twenty-six regular full-time Laboratory employees selected for the November 1995 RIF from the BUS Division performed support functions for the Laboratory. Accordingly, the BUS RIF successfully contributed to a reduction in the ratio of support personnel to technical personnel at the Laboratory.

The chance probability of the difference between the actual and expected number of Hispanic employees affected by the RIF was not statistically significant as a matter of law.

## 2. Chemical Science and Technology Division

Unlike the BUS Division, the CST Division's primary "driver" for the November 1995 RIF was not the need to reduce the support to technical ratio but was an anticipated budgetary shortfall of approximately twenty-five million dollars.<sup>8</sup> To implement the RIF in this relatively large division, CST formed the Workforce Working Group, made up of several CST group leaders.

The Workforce Working Group defined approximately forty-six skills sets within the CST Division. CST group leaders then asked employees to self-select the skills set to which they should be assigned based on their job function. Group leaders reviewed the employees' self-selection to ensure the skills sets consisted of inter-changeable employees - i.e., to ensure that any employee in a particular skills set could perform the job of any other employee in that skills set. Some skills sets were comprised entirely of employees in a particular group within CST, while other skills sets were made up of employees from more than one group. After the group leaders defined the skills sets and assigned employees to skills sets, group leaders then examined the skills sets to determine which skills sets would have to be reduced due to budgetary shortfalls. The CST Division Workforce Working Group consolidated the input from all group leaders and made the final determination of how many employees would be let go from each skills set in CST.

Next, group leaders and team leaders within each group ranked all employees, including team leaders, within the relevant skills sets according to the four factors. The Workforce Working Group further defined the four factors based on the specific needs of CST, a highly technical division. Group and team leaders evaluated employees in each factor on a scale

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<sup>8</sup> However, as in all divisions, the need to reduce the support to technical ratio was of some concern to the CST Division.



from "O" to "3." Each factor was weighted equally. Group and team leaders sought input from their fellow managers and repeatedly met to discuss rankings to ensure accuracy and consistency.

Although the supervisor most familiar with the employee's work provided the preliminary ranking for each employee, these rankings were reviewed numerous times at numerous levels. First, team leaders sought input from other team leaders within the group to ensure rankings were consistent among all supervisors who had reviewed the employee. Second, group leaders met with one another to discuss the validity of the rankings. Next, committees made up of a subset of group leaders sharing employees in a particular skills set met to finalize the rankings in that skills set. In each affected skills set, the employees with the lowest total score received RIF notices. In the rare case in which two or more employees at the bottom of an affected skills set had the same score, the group leader decided which employee would receive a RIF notice based on the accumulation of information obtained throughout the ranking process.

Finally, the Oversight Committee reviewed CST's RIF Justification Memorandum and ranking matrices. As a result of this careful and deliberate process, sixteen regular full-time Laboratory employees received RIF notices from CST Division. The chance probability of the difference between the actual and expected number of Hispanic employees selected for the RIF from CST was not statistically significant as a matter of law.

### 3. Engineering Science and Applications Division

The Engineering Sciences and Applications ("ESA") Division participated in the November 1995 RIF based on the need to reduce the support to technical ratio and, to a lesser extent, based on budgetary shortfall.

First, managers within the division defined skills sets and assigned ESA employees to skills sets based on their job functions. Next, group leaders and deputy group leaders assigned a raw score to each employee working under that leader based on the four factors. Employees were scored between "O" and "4" for each factor. Each factor was then given equal weight, for a total score of between "O" and "16". Next, group leaders met to discuss the scores of employees in overlapping skills sets to ensure consistency. Employees' scores were then reviewed and approved by the division manager in a series of meetings with management, group leaders, and deputy group leaders. Managers then placed employees into three pay groups within their skills set - Technical Staff Member ("TSM"), Tech and Administrative.

Division managers then conducted statistical analyses to create a "bell curve" distribution within each of the ten groups in the division. Each employee was then assigned a "norm score." Employees were then placed into approximately thirty skills sets and ranked according to their "norm score." In a few cases, individual raw scores were adjusted up or down slightly to conform with the norm score distribution. Division managers and group leaders then met to determine which skills sets had to be eliminated or reduced.

Again, meetings were held among the division management team to determine the final RIF selections based on the rankings. Finally, the Oversight Committee reviewed ESA's final selection matrices and RIF Justification Memorandum for consistency within the division

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and to ensure compliance with all antidiscrimination laws. At the conclusion of this process, twenty-two full-time regular Laboratory employees received RIF notices from ESA Division.

The chance probability of the difference between the actual and expected number of Hispanics laid off from the ESA Division was not statistically significant as a matter of law.

## **VI. ANALYSIS OF IMPACT OF RIF**

As an initial matter, it should be noted that even accepting the flawed statistical analyses presented in the NORI, though flawed in both the dataset and method used, the level of significance of the difference between layoff rates for Whites and Hispanics is not high. In fact, the difference in layoff rates between the two groups is in the "gray" area between two and three standard deviations. This is especially legally significant given the complete absence of any direct or anecdotal evidence of unlawful discrimination necessary for OFCCP to even cross the "*prima facie*" case threshold.

Second, the statistical formula your office used to obtain its flawed result contains a significant error in addition to inappropriate aggregation. When the error is corrected, OFCCP's own statistical formula reveals no legally statistically significant adverse impact against Hispanic employees.

More specifically, the statistical formula attached to your November 21, 1996 letter to Director Hecker is designed to aggregate skills sets across all divisions of the Laboratory, rather than aggregate only within each division, or decision-making unit. Such aggregation is inappropriate given the structure of the November 1995 RIF. However, in addition to this architectural problem, your office's statistical formula itself suffers from a simple but crucial error. In the denominator of the fraction under the square root sign, the number "Nt" (representing the total number incumbents in skills pools) should be "Nh" (the total number of Hispanic incumbents in skills pools). Substitution of "Nh" (1003 Hispanic incumbents) for "Nt" (2876 total incumbents), while using OFCCP's data, reduces the Z-score from 2.74 to 1.61 standard deviations, a figure which is not statistically significant as a matter of law.

Finally, a careful analysis of the 1995 RIF which does not improperly aggregate across decision-making units and is based on a sound statistical formula reveals there is no statistically significant difference between layoff rates for Whites and Hispanics, as a matter of law. As noted above, a primary and fundamental flaw in the statistical analysis presented in the NORI is the inappropriate aggregation of selection rates across decision-making units. Since, as discussed above, the November 1995 RIF was a division-by-division, rather than a Laboratory-wide RIF, any statistical analysis of the impact of the RIF must be conducted on a division-by-division basis. The NORI asserts aggregation across the Laboratory is necessary because the sample size in some divisions is too small to make for meaningful statistical analysis. While this is true, the RIF and the at-issue employee universes are what they are. OFCCP is not at liberty to combine selection pools together simply to cause a large sample to result. Otherwise, OFCCP would be conducting an "apples to oranges" comparison instead of an "apples to apples"

comparison as the law requires.<sup>9</sup> When the number of employees at risk of lay-off under a single decision-maker is small, statistical tests are less likely to be informative about the presence of disparate treatment, as OFCCP's statistical expert has acknowledged. Inappropriate aggregation across decision-makers does not solve the problem, however, but merely produces statistics that do not accurately reflect the decisions being analyzed. Instead of statistical tests, OFCCP must resort to individual "comparative" evidence disparate treatment analyses.

A division-by-division approach is consistent with federal law, including that of the United States Court of Appeals for the Tenth Circuit (which has responsibility for New Mexico) and examines statistical evidence comparing individuals in "comparable" positions. *See, e.g. Furr v. Seagate Technology* (See Tab 13), 82 F.3d 980, 988 (10th Cir. 1996) (terminated employee's qualifications "relevant only in relation to employees performing the same functions"); *Cone v. Longmont United Hosp. Ass'n* (See Tab 14), 14 F.3d 526, 532 (10th Cir. 1994) (to raise inference of discrimination, plaintiff must demonstrate employees being compared were similarly situated); *Coleman v. Navistar* (See Tab 15), 1996 U.S. Dist. LEXIS 10722 at 41 (N.D. 111. July 24, 1996) (inference of age discrimination must be premised on fungibility between plaintiff's job and retained employee's job, as "a mechanic terminated in an RIF case could not make a *prima facie* case because a younger chemist was retained").<sup>10</sup>

## VII. CONCLUSION

The Laboratory disagrees with the preliminary findings of discrimination with respect to the November 1995 RIF as described in the October 11, 1996, Notice of Results of Investigation. There is no evidence that any Laboratory manager, let alone division, unlawfully discriminated on the basis of national origin or any other impermissible factor in the RIF selection process. Moreover, the OFCCP's own statistical analyses, once the simple error in the

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<sup>9</sup> *See Watson v. Ft. Worth Bank & Trust* (See Tab 9), 487 U.S. 977, 980, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988) (in failure to hire case, statistics which include in applicant pool individuals lacking minimum job qualifications are of little probative value); *Trout v. Hildago* (See Tab 10), 517 F. Supp. 873, 883 (D.D.C. 1981) (burden of comparing appropriate groups in terms of minimum objective qualifications more onerous in case where disparate occupational categories are involved than in case where all members of the class are professional, administrative, or technical employees with generally similar job skills); *Faulkner v. Super Valu Stores* (See Tab 11), 3 F.3d 1419, 1431 (10th Cir. 1993) (jobs properly "at-issue" in age discrimination case must be substantially similar with respect to qualifications, duties, required skills, and application process); *Mountain Side Mobile Estates Partnership v. See't-y of Housing and Urban Development* (See Tab 12), 56 F.3d 1243, 1253 (10th Cir. 1995) (any statistical evidence used to show discriminatory effect must involve appropriate comparables; in Title VII case, proper comparison focused on local rather than national housing market and family statistics).

<sup>10</sup> With regard to an analysis of the Laboratory's 1995 RIF, this legally-mandated "apples to apples" approach requires a comparison of how each division treated Hispanic and non-Hispanic employees in the same skills pool. An approach which fails to compare similarly situated employees, or which relies on an "apples to oranges" approach, does not provide a meaningful analysis of the impact of the RIF. Thus, an analysis which purported to compare employees across skills groups (comparing, for example, a White desk top publisher in the Business Applications division to an Hispanic janitor in the Facilities, Security and Safeguards division), could not be relied on to raise an inference of unlawful discrimination.

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formula is corrected, reveals no legally statistically significant impact on Hispanic employees even before correcting for the "aggregation of divisional" result error.

In addition to the significant errors in its statistical evidence, OFCCP has adduced no competent evidence of a "pattern or practice" of discrimination, i.e., that unlawful discrimination was the "usual" or "normal" practice in the November 1995 RIF. Similarly, OFCCP has adduced no "pretext" evidence to show the Laboratory's reasons for its RIF selections were false.

Because the November 1995 RIF was not discriminatory on the basis of national origin or any other impermissible factor, the Laboratory requests your office to dismiss in their entirety the claims of the fourteen complainants, including any class claims, and that the October 11, 1996, Notice of Results of Investigation be withdrawn to indicate the Laboratory did not violate Executive Order 11246 in conducting its November 1995 RIF.

Very truly yours,

John C. Fox

JCF/se  
Enclosures